

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Pursuant	)	WC Docket No. 18-141
to 47 U.S.C. § 160(c) to Accelerate Investment in	)	
Broadband and Next-Generation Networks	)	
	)	

**COMMENTS OF LIBERTY CABLEVISION OF PUERTO RICO LLC**

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## **Executive Summary**

Liberty Cablevision of Puerto Rico opposes USTelecom's Petition for Forbearance. USTelecom seeks broad nationwide relief from two key obligations imposed on all incumbent local exchange carriers ("ILECs") – the obligation to provide access to unbundled network elements ("UNEs") under Section 251(c)(3) and the obligation to provide retail services for resale at wholesale, discounted prices under Section 251(c)(4). The Commission should deny the Petition both because USTelecom lacks standing to pursue the relief it seeks – particularly for non-member ILECs – and because its substantive justification for relief is inadequate.

With respect to standing, Section 10(c) states that either a specific "telecommunications carrier" or a "class" of such carriers may seek forbearance. USTelecom is neither. It is a trade association, and, applying the normal rules for when an association may seek relief on behalf of its members under the three-part test of *Hunt v. Washington State Apple Advertising* 432 U.S. 333 (1977), USTelecom does not qualify. The relief sought can only be granted based on a market-by-market analysis of competitive conditions, and USTelecom's broad-brush, nationwide statistics obscure the significant variations in competitive conditions among different areas of the country.

At the very least, the Commission should deny the Petition as it relates to Puerto Rico. The Puerto Rico Telephone Company ("PRTC") – the ILEC in Puerto Rico – is not a member of USTelecom, so USTelecom clearly lacks standing to seek relief for Puerto Rico. Moreover, on the merits, market conditions in Puerto Rico are very different from the picture of robust competition presented by USTelecom. For example, PRTC retains roughly 67% of the wired local telephone service market in Puerto Rico, a dominant position quite unlike that presented by USTelecom for the nation as a whole. In further contrast to the situation presented by

USTelecom, in Puerto Rico VoIP services have only achieved a 25% share of the wired voice market. The Commission has previously acknowledged that carriers in Puerto Rico face “unique” challenges due to severe weather, pervasive poverty, high costs, and other factors. These same factors make it inappropriate to grant relief from Sections 251(c)(3) and (c)(4) at all, much less on the basis of broad-brush, nationwide statistics like those presented by USTelecom.

ILEC duties under Sections 251(c)(3) and (c)(4) play a critical role in fostering and enabling competition. In Puerto Rico, enforcing those duties has allowed competing local exchange carriers (“CLECs”) to compete with PRTC on a market-wide basis even in those portions of Puerto Rico where it is economically infeasible for a CLEC to deploy its own competitive facilities. Sections 251(c)(3) and (c)(4) (along with other provisions of Section 251(c)) represent Congress’ chosen means to open local telephone markets to competition. Granting the USTelecom Petition, therefore, would do away with the fundamental instruments that allow CLECs to compete. The Commission should not take such a radical step in any market without clear evidence that these key competitive protections are no longer needed in that specific market. Setting aside the core competitive protections established by Congress on the basis of broad-brush statistics of the sort presented by USTelecom is clearly inappropriate.

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**COMMENTS OF LIBERTY CABLEVISION OF PUERTO RICO LLC**

Liberty Cablevision of Puerto Rico, LLC (“Liberty”) submits these comments on the petition for forbearance filed by the United States Telecom Association (“USTelecom”) on May 4, 2018.<sup>1</sup> The Commission should deny the USTelecom Petition with respect to Puerto Rico. USTelecom lacks standing to request relief for Puerto Rico, since the incumbent local exchange carrier (“ILEC”) serving Puerto Rico is not a member of the organization. On the merits, the market and competitive conditions in Puerto Rico are vastly different than those depicted in the Petition for the nation as a whole, and do not remotely support the far-reaching forbearance from central ILEC obligations that USTelecom seeks.

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<sup>1</sup> Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (filed May 4, 2018) (the “Petition” or the “USTelecom Petition”). Pursuant to the scheduling order adopted by the Wireline Competition Bureau, these comments are timely filed on August 6, 2018. *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, Order, DA 18-574, (WCB June 1, 2018).

## **I. DISCUSSION**

### **A. The USTelecom Petition**

USTelecom seeks nationwide forbearance for all ILECs, under Section 10 of the Act,<sup>2</sup> from the following obligations: (1) Section 251(c)'s unbundling and resale provisions and associated obligations under Sections 251 and 252; (2) Section 272(e)(1)'s requirements regarding the relationship of Regional Bell Operating Companies ("RBOCs") with their affiliates and related obligations; and (3) Section 271(c)(2)(B)(iii)'s requirement that RBOCs provide nondiscriminatory access to poles, ducts, conduits and rights-of-way in accordance with Section 224.<sup>3</sup> No RBOC operates in Puerto Rico, so Liberty will not comment on the proposal to forbear from RBOC-specific provisions in the Communications Act (the "Act"). As a result, these comments are limited to USTelecom's request for forbearance relating to Sections 251(c)(3) and (c)(4) and associated provisions in Section 252.

With regard to these provisions, USTelecom specifically asks the Commission to forbear nationwide from enforcing the following key procompetitive obligations:

- (1) Section 251(c)(3)'s obligation to provide unbundled access to network elements;
- (2) Section 251(c)(4)'s obligation to offer retail services for resale at an avoided cost discount;
- (3) Section 252(a)-(c), (d)(1), (d)(3), (e), and (h)'s requirements regarding interconnection agreements;
- (4) Section 251(c)(1)'s duty to negotiate insofar as they implement Section 251(c)(3) and (4) obligations (and only to that extent); and

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<sup>2</sup> 47 U.S.C. § 160. To conform to standard usage, we refer to this statutory provision as "Section 10." Otherwise, references to particular "Sections" of the Act are to sections of 47 U.S.C.

<sup>3</sup> USTelecom Petition at iv.

- (5) Section 251(d)(3) to the extent that provision would authorize states to reimpose unbundling and resale obligations from which the Commission has otherwise forborne.<sup>4</sup>

USTelecom claims that these provisions are no longer necessary in the local telecommunications marketplace, based on a broad-brush review of certain nationwide market statistics. As described below, however, even if USTelecom's analysis is accurate at that high level, the nature of its forbearance claim under Section 10 requires a market-by-market analysis.

In particular, USTelecom's conclusions are clearly wrong as applied to Puerto Rico. The Commission has long recognized that the Puerto Rico telecommunications market is "unique," in terms of the cost of providing service, the difficulties engendered by being repeatedly subject to severe weather, income disparities and other factors arising from its being an island in the Caribbean rather than part of the contiguous United States.<sup>5</sup> These longstanding and unique factors do not just affect the market for broadband services being addressed in connection with

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<sup>4</sup> *Id.* at 24-25.

<sup>5</sup> *Connect America Fund*, Report and Order, 29 FCC Rcd 15644, 15661-63, para. 46 (2014) (carriers in Puerto Rico "face unique circumstances in the areas they serve"); *Connect America Fund*, Order, 32 FCC Rcd 7981, 7985, para. 15 (2017) (carriers in Puerto Rico face "unique hardships" as a result of the 2017 hurricanes). *See also Connect America Fund et al.*; WC Docket Nos. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17737, para. 193 (2011) ("*USF/ICC Transformation Order*") *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) ("carriers serving Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands and Northern Marianas Islands ... face operating conditions and challenges that differ from those faced by carriers in the contiguous 48 states"); *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Dkt. No. 18-143 *et al.*, Comments of Puerto Rico Telephone Company ("PRTC") (filed July 26, 2018) at 12-13, 24; *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 99-204, para. 5; *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Proposed Rulemaking, 20 FCC Rcd 19731, 19744-19748, paras. 30-38 (2005) (*2005 Notice of Proposed Rulemaking*) (The Commission find that there are "unique challenges in providing telephone service in Puerto Rico [...]").

the Uniendo a Puerto Rico Fund;<sup>6</sup> they have long had an impact on the market for basic local telephone service – the focus of Sections 251(c)(3) and (c)(4) – as well. These unique factors, among others discussed below, have led to a situation in which the ILEC – PRTC – retains a commanding market position with regard to fixed wireline telephone service and operates under conditions that make that commanding position particularly difficult for CLECs to attack in the absence of regulatory intervention, including the ILEC-specific obligations of Sections 251(c)(3) and (c)(4).

It bears emphasis that the provisions addressed by the Petition – CLEC access to UNEs and discounted resale – are key, central features of the pro-competitive regime established by the Communications Act. Congress passed the Telecommunications Act of 1996 to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>7</sup> To accomplish that goal, Sections 251 and 252 set out a series of duties that telecommunications carriers owe to each other, including duties that ILECs owe to their competitors under Section 251(c). Section 251(c) duties fall only on ILECs, and include access to network elements on an unbundled basis (Section 251(c)(3)) and the obligation to offer for resale, at wholesale rates, any telecommunications service that the ILEC provides at retail (Section 251(c)(4)).

These key duties play a critical role in fostering and enabling competition – they permit a CLEC to compete with the ILEC on a market-wide basis even in those areas where it is

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<sup>6</sup> See *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Dkt. No. 18-143 *et al.*, Comments of Liberty Cablevision of Puerto Rico, LLC (filed July 26, 2018) (“Liberty *Uniendo a Puerto Rico Fund* Comments”). Liberty incorporates its comments in the *Uniendo a Puerto Rico Fund* proceeding here by reference.

<sup>7</sup> Pub. L. No. 104-104, 110 Stat. 56.



economically infeasible for the CLEC to deploy its own competitive facilities to duplicate those of the ILEC. As a result, fulfilling these duties is and has been important in limiting monopoly power in local markets, and enabling new entrants – CLECs – to actually compete.<sup>8</sup>

**B. USTelecom Lacks Standing to Request Forbearance on Behalf of Its Members, and Certainly Lacks Standing to Obtain Relief for Non-Members such as PRTC.**

The Commission should dismiss the Petition without considering its merits, because USTelecom lacks standing to raise the issues addressed in its Petition.

Section 10(c) of the Act establishes who may request forbearance: “any telecommunications carrier, or class of telecommunications carriers” may file a petition requesting the Commission to exercise its forbearance authority.<sup>9</sup> USTelecom is not a

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<sup>8</sup> There may be some markets where, because the demand for basic local telephone service is high, and the cost of deploying alternative facilities to provide such service is low, CLECs don’t need to use ILEC facilities to compete. That is clearly not the case in Puerto Rico, however. Here, the ILEC has only been able to construct and maintain a reasonably ubiquitous local service network as a result of substantial historical and ongoing subsidies in the form of High Cost and, later, CAF support. *2005 Notice of Proposed Rulemaking*, para. 33 (The Commission found that there was “a correlation between the [...] decline in Puerto Rico’s subscribership rates and the reduction of Puerto Rico’s high-cost support”). *See also*, Liberty *Uniendo a Puerto Rico Fund* Comments at 22 & n. 47; *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Dkt. No. 18-143 *et al.*, Comments of Puerto Rico Telephone Company (filed July 26, 2018) at 7 (“PRTC [has] the most extensive telecommunications network in Puerto Rico”). Note that the same market conditions that justified the provision of high-cost support also necessarily suggest that CLECs may find it economically infeasible to fully compete across an ILEC’s entire footprint by means of constructing their own alternative facilities. *See infra*.

<sup>9</sup> 47 U.S.C. § 153 (51) defines telecommunication carrier as:

(51) The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

telecommunications carrier; it is a trade association whose members are carriers. Consequently, it has no standing to request the forbearance relief that it seeks.

While trade associations sometimes are found to have standing on behalf of their members, USTelecom does not have such standing here. The Supreme Court has held that a trade association has standing on behalf of its members when:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Washington State Apple Advertising* 432 U.S. 333, 343 (1977); *see also, Warth v. Seldin*, 422 U.S. 490 (1975). Applying these principles here, it is clear that USTelecom does not meet the third prong of the *Hunt* test.<sup>10</sup>

The relief USTelecom seeks makes individual participation of each affected company indispensable to proper resolution of the issues. When considering whether key pro-competitive provisions of the Act should be dispensed with, individual participation of ILECs is essential, because no two markets are alike. One could argue that competitive conditions in New York and Miami and Houston and Los Angeles are broadly similar (on the theory that most large metropolitan areas in the continental United States are similar). But there is no reason to think that the same is true of Saratoga Springs, Independence, Apalachicola, Abilene or Redding. Whether one slices the country into states, LATAs, Metropolitan Statistical Areas (MSAs), incorporated cities, or exchange areas, competitive conditions differ from place to place, from

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<sup>10</sup> The Commission is not an Article III court. Even so, the fact that Section 10(c) specifically identifies the entities that are entitled to raise forbearance claims – and limits it to a “telecommunications carrier” or a “class” of such carriers – clearly indicates that the Commission must consider principles of standing in addressing forbearance petitions. Indeed, the fact that Congress expressly required forbearance petitions to be raised by carriers strongly suggests that in evaluating such petitions, carrier-specific data should be produced and considered. *See infra*.

MSA to MSA, and from wire center to wire center. Thus, the only realistic way to assess those conditions is with the direct participation of the ILECs who serve them.<sup>11</sup>

This is particularly true with respect to Puerto Rico, which is geographically distinct from the rest of the country, where carriers face “unique” challenges in providing service,<sup>12</sup> and where PRTC is not even a member of USTelecom.<sup>13</sup> The test for forbearance – whether competition will sufficiently prevent the ILEC from engaging in behavior that harms competitors and consumers – inherently requires an assessment of market-specific competitive conditions. The Commission must obtain information – on a market-by-market basis – to determine that “there is sufficient competition to ensure that, if [the Commission] provide[s] the requested relief, the [ILEC] will be unable to raise prices, discriminate unreasonably, or harm consumers.”<sup>14</sup> While there may be circumstances in which such an assessment can be made on a nationwide basis, that clearly is not the case with respect to the core competitive protections that USTelecom is trying to eliminate.

In these circumstances, the participation of individual ILEC members of USTelecom is necessary to ascertain whether there is sufficient competition to warrant forbearance in any or all of the markets where those individual ILECs provide their services. As a result, USTelecom

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<sup>11</sup> This is why the Commission has ruled that assessments of competitive conditions cannot be made on a broad-brush, nationwide basis. *See infra*.

<sup>12</sup> *See* note 8, *supra*.

<sup>13</sup> *See* <https://www.ustelecom.org/who-we-are/ustelecom-members> (listing members of the organization). Note that, unlike Puerto Rico, other geographically distinct parts of the country, such as Alaska and Hawaii, do have representative companies that are members of USTelecom.

<sup>14</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 at para. 2, 21, 37 (rel. June 22, 2010) (“*Qwest Phoenix Forbearance Order*”).

cannot meet the third prong of the test for organizational standing under *Hunt*. It would thus be entirely inappropriate to conclude that USTelecom has standing to assert claims under Section 10, even on behalf of its members. Furthermore, it clearly lacks standing to assert such claims on behalf of **non-member ILECs**, such as PRTC. The Commission, therefore, should dismiss the Petition entirely, on the ground that USTelecom lacks standing. At a minimum, the Commission should dismiss the Petition to the extent that it could be construed to apply to Puerto Rico (or any other area where USTelecom members do not operate as ILECs).

**C. PRTC Retains A Dominant Market Position with Respect to Wired Local Telephone Service.**

The essence of USTelecom’s argument is that fixed voice customers can now obtain basic telephone service from wireless, Voice over Internet Protocol (“VoIP”), cable, and other providers.<sup>15</sup> USTelecom also asserts that ILEC voice market shares have fallen significantly, that only 11% U.S. households are projected to have traditional switched service from an ILEC by the end of the year, and that wireless, cable and CLEC alternatives for voice service have

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<sup>15</sup> *Id.* at i. While USTelecom’s Petition depends heavily on the implicit claim that wireless service is, effectively, a replacement for landline service, *see id.* & *passim*, the Commission should act with caution in considering such a claim. The distinctions between landline and wireless service remain significant, whether with respect to service reliability, call quality, or other features. Furthermore, the Commission has recognized that “that mobile wireless service and wireline telephone services are not perfect substitutes”. *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Areas*, Mem. Op. and Order, 23 F.C.C.R. 11729, 11743, para. 30 (2008); *see also, High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Order, 23 FCC Rcd 8834, para. 22 (2008) (noting that “the majority of households do not view wireline and wireless services to be direct substitutes.”). Moreover, a Commission determination – even an implicit one – that wireless is a replacement for landline could have far-reaching and untoward regulatory consequences for the wireless industry, notably under 47 U.S.C. § 332(c)(3)(A) (permitting states to regulate wireless service rates in certain circumstances).

risen dramatically, are gaining an increasing share, and will surpass the ILEC by the end of this year.<sup>16</sup>

These claims are simply wrong as applied to Puerto Rico. First, it is unclear that the data presented even considers the Puerto Rican market. Second, while ILEC switched voice lines in Puerto Rico have dropped over the last 18 years, the decline has not been as great as in the United States overall (as depicted by USTelecom). In fact, by 2013 the number of ILEC switched voice lines in Puerto Rico appears to have hit a plateau. In any event, both over the longer term and since 2013, the decline of wired voice telephone service in Puerto Rico has been significantly less than in the United States as a whole.<sup>17</sup> The USTelecom petition states that from 2000 to 2016, ILEC switched access lines nationwide decreased by 74%, with a decline of 81% projected for the end of 2018.<sup>18</sup> However, between 2001 and May 2018, PRTC's switched access lines have decreased much less – only by 63%.<sup>19</sup> Furthermore, between 2013 and 2018, switched access lines in Puerto Rico decreased by only 14% - roughly 3.4% per year – as opposed to the United States as a whole (as represented by USTelecom) where, during the same

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<sup>16</sup> *Id.* at 8 and 9. It also claims that Section 251(c) regulations impose compliance costs and force ILECs to dedicate additional resources to legacy telephone networks rather than broadband network and advance services. *Id.* at iv and 23. *See infra* for a discussion of this claim.

<sup>17</sup> Puerto Rico Telecommunications Regulatory Board, *Estadísticas de la Industria de las Telecomunicaciones en Puerto Rico*, Informe Mensual Mayo 2018, [https://docs.google.com/viewerng/viewer?url=http://www.jrtpo.pr.gov/estadisticas/Estadisticas\\_Telefonia.pdf&hl=en\\_US](https://docs.google.com/viewerng/viewer?url=http://www.jrtpo.pr.gov/estadisticas/Estadisticas_Telefonia.pdf&hl=en_US) (TRB May 2018 Statistics), p. 2 (Chart: Mercado de Voz en Puerto Rico, Diferencia Anual entre Líneas Alámbrica e Inalámbricas).

<sup>18</sup> USTelecom Petition, p. 8.

<sup>19</sup> *Id.*; *see also* Puerto Rico Telecoms, *Mobile And Broadband - Statistics And Analyses*, 15<sup>th</sup> Edition, Published 18 December 2017, Paul Budde Communication Pty Ltd., p. 11

period, switched access lines are projected to decrease by 50%<sup>20</sup> – or roughly 13% per year. So, contrary to USTelecom’s analysis, PRTC’s switched access lines have not been decreasing “precipitously” in Puerto Rico, at least in recent years.

Moreover, notwithstanding the decrease in switched access lines, PRTC continues to be the dominant carrier in the switched access service and fixed voice service markets. While in the United States as a whole, competitive alternatives to fixed voice service competitive alternatives have arisen,<sup>21</sup> in Puerto Rico that has not occurred to the same degree. USTelecom projects that in the fixed voice residential market, non-ILECs will have a market share of 55%, with ILECs holding the remaining 45%.<sup>22</sup> In contrast, in Puerto Rico, by the end of 2018, PRTC will command control of two thirds (⅔) of the total fixed voice market (residential and business) (*i.e.* **67%** of the total 762,758 lines).<sup>23</sup> This commanding market share shows that PRTC remains

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<sup>20</sup> *TRB May 2018 Statistics*, p. 2 (Chart: Mercado de Voz en Puerto Rico, Diferencia Anual entre Líneas Alámbrica e Inalámbricas); *USTelecom Petition*, p. 8

<sup>21</sup> *USTelecom Petition*, p. 9 - 10.

<sup>22</sup> *USTelecom Petition*, Chart 3, page 10.

<sup>23</sup> This figure is based on submissions by Puerto Rico carriers to the Telecommunications Regulatory Board of Puerto Rico and the Federal Communications Commission. *See TRB May 2018 Statistics*, p. 4 (Chart: Mercado de Voz en Puerto Rico, Distribución entre Líneas Alámbricas, Inalámbricas y VoIP); The Commission’s own most recently available data, for June 2016, show that the ILEC in Puerto Rico (PRTC) had a market share of approximately 62% of landline service (including VoIP) – a commanding market position, and well above the figures presented by USTelecom for the nation as a whole. *See State-Level Subscriptions*, <https://www.fcc.gov/voice-telephone-services-report>. The Commission’s data also shows that from 2015 to 2016, PRTC increased its subscriptions by more than 5,000 lines. Based on Liberty’s understanding and assessment of the market, Liberty believes that this line increase has held through 2017 and 2018, and that by the end of the year PRTC will provide service to 67% of fixed voice lines. This is not the first time that PRTC has increased its subscription since the approval of the Telecommunications Act. For example, at year-end 2009, PRTC had 610,000 switched access lines, but by the end of 2010, that figure had grown to 707,000, an increase of 93,000 in twelve months. As the data shows, PRTC has delayed and even defied the downward trend in traditional switched access lines that other ILECs have experienced in the United States.

dominant, and that competition cannot be viewed as fully rooted in Puerto Rico. Furthermore, if one considers PRTC's market share by municipality or MSA, it is highly likely that outside of the San Juan metropolitan area, PRTC's share of the fixed voice market (residential and business) is in excess of 90%.

Moreover – and working with the conservative figure of a 67% market share for PRTC – most of the remaining 33% of the fixed voice market (residential and business) is served by CLECs that rely on UNEs or resale. According to the Commission's State-Level Subscription and State-Level Provider Counts reports for 2016, out of the seven (7) CLECs that provided fixed voice service, only one (1) provided the service over its own last-mile facilities.<sup>24</sup> Accordingly, eliminating Section 251(c)(3) and (c)(4) obligations in Puerto Rico would create chaos in the Puerto Rico telecommunication market, severely affecting the ability of CLECs to provide services. Finally, VoIP substitution in Puerto Rico has been slower than elsewhere in the United States, representing only 25% of fixed voice lines.<sup>25</sup> So, in Puerto Rico, VoIP does not represent a substitute to switched access lines – certainly not to the extent that it does in the rest of the United States.

The same pattern applies when the focus is on business services. Although Ethernet services have transformed the business market, PRTC's traditional TDM service continues to represent a significant portion of that market. As in the residential market, new technology has not replaced TDM services as rapidly as in the continental United States. In Puerto Rico,

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<sup>24</sup> <https://www.fcc.gov/voice-telephone-services-report>

<sup>25</sup> *Id.*

business TDM voice service has declined from 322,544 lines in 2007 to 201,594 lines in 2017, a reduction of 37%, or only about 4.5% per year.<sup>26</sup>

The market reality in Puerto Rico, in short, does not conform to USTelecom's presentation. The Commission observed last year that "almost 75 percent of U.S. residential customers (approximately 88 million households) no longer receive[d] telephone service over traditional copper facilities."<sup>27</sup> As just discussed, while the market for traditional copper-based landline basic telephone service is declining in Puerto Rico, that decline has not been nearly as dramatic as USTelecom represents for the nation as a whole, and PRTC's share of landline service in Puerto Rico significantly exceeds the national figures advanced by USTelecom.

**D. PRTC's Dominant Market Position Reflects and Arises From the Same Factors that Make the Puerto Rico Market Unique.**

PRTC's dominant market position with respect to switched access and local telephone service is not an accident. To the contrary, the same factors that make Puerto Rico a uniquely challenging environment for carriers in general to operate<sup>28</sup> have, over the last several decades,

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<sup>26</sup> Puerto Rico Telecommunications Regulatory Board, *Estadísticas de la Industria de las Telecomunicaciones y Televisión por Cable en Puerto Rico*, Informe trimestral Enero a Diciembre Mayo 2017, [https://docs.google.com/viewerng/viewer?url=http://www.jrtpr.pr.gov/estadisticas/TRIMESTRAL01\\_ESTADISTICAS\\_2017.pdf&hl=en\\_US](https://docs.google.com/viewerng/viewer?url=http://www.jrtpr.pr.gov/estadisticas/TRIMESTRAL01_ESTADISTICAS_2017.pdf&hl=en_US) (TRB 2017 Statistics), p. 2 (Chart: Telefónica Alambica anual entre líneas POTs – Residencial y Comercial)

<sup>27</sup> *Technology Transitions; USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Red 8283, 8289-90 para. 16-18 (2016) ("Technology Transitions Declaratory Ruling"), par 16 citing *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. 160(c) from Enf't of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, WC Docket No. 14-192, Memorandum Opinion and Order, FCC 15-166, (rel. Dec. 28, 2015) (2015 USTelecom Forbearance Order).

<sup>28</sup> See note 5, *supra*.



made it more challenging for competitors to succeed, and correspondingly more critical that competitors continue to have access to UNEs and discounted resale from PRTC.

As the Commission is aware, PRTC has long been a recipient of substantial amounts of High Cost and CAF support.<sup>29</sup> The basic logic of High Cost support is that it is unusually expensive to serve the areas where the recipient carrier operates – obviously the case in Puerto Rico. High Cost Support subsidizes service so a carrier can serve high cost areas, which otherwise it would not serve.<sup>30</sup> For example, in 2010, PRTC’s cost to install a local wireline loop in the interior (*i.e.*, mountainous areas) of Puerto Rico ranged from \$5,000 to more than \$15,000.<sup>31</sup> The same factors that justify the provision of such support make it much more likely that a competitor will find it economically unviable to construct parallel, competing facilities – at least for many portions of the ILEC’s footprint. Specifically, the CLEC’s costs, like the ILEC’s, will be unusually high, which will make it much more challenging for a CLEC to compete by means of constructing its own alternative network rather than by relying, at least in part, on UNEs and discounted resale. Over time, as technology evolves and the Commission’s programs providing support to high-cost carriers adjust to changing conditions, this situation may change. But for now, in the context of USTelecom’s specific request for forbearance, the Commission cannot rationally choose to ignore the negative impact on competitors caused by the same technical, market, and economic conditions on which the Commission relies to justify support

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<sup>29</sup> See *Liberty Uniendo a Puerto Rico Fund* Comments at p. 22 n. 46. See note 8 *supra*.

<sup>30</sup> 2005 *Notice of Proposed Rulemaking*, para. 33 (The Commission found that there was “a correlation between the [...] decline in Puerto Rico’s subscribership rates and the reduction of Puerto Rico’s high-cost support”).

<sup>31</sup> *Id.*, para. 31.

and subsidies for high-cost carriers.<sup>32</sup> This means that in such areas, CLECs seeking to offer competing local telephone service will, for the foreseeable future, need access to ILEC UNEs and discounted resale to compete in certain portions of the ILEC's footprint.<sup>33</sup> As stated before, in 2016, of all CLECs in the market only one (1) provided service over its own last-mile facilities.<sup>34</sup>

The persistence of PRTC's dominance of the wired local exchange and switched access markets in Puerto Rico, therefore, is not a random statistical fluke, nor does it somehow reflect that competition is merely taking longer to become established in Puerto Rico as compared to the rest of the country. To the contrary, PRTC's enduring market dominance reflects the same realities of the Puerto Rico telecommunications market that distinguish it from other parts of the United States and that the Commission has recognized make Puerto Rico unique.

For example, as is well known, Puerto Rico is subject to severe and sometimes devastating tropical weather, such as Hurricanes Irma and Maria in 2017. This creates periodic situations where communicating by telephone becomes extremely critical – sometimes a matter of life and death.

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<sup>32</sup> The fact that some carriers in some parts of the country have benefitted from significant subsidies over time, while others have not, is another factor that undercuts USTelecom's claim that broad-brush, nationwide forbearance relief is reasonable.

<sup>33</sup> This should not be taken to suggest that Liberty (or other CLECs) want to be reliant on PRTC's services and infrastructure to compete. To the contrary, Liberty strongly prefers to serve its customers using its own facilities to the maximum extent possible, and has aggressively built out its network (and, after the 2017 hurricanes, rebuilt its network) to allow it to do so. *See Liberty Uniendo a Puerto Rico Fund* Comments at 3. The unfortunate fact, however, is that it is not economically rational for a CLEC like Liberty to build its own facilities to all customers – for the same reasons, and reflecting the same cost conditions, that it was not economically rational for PRTC to build out its own facilities without government help.

<sup>34</sup> *See* note 24, *supra*

At the same time – as, unfortunately, the island’s experience in Hurricane Maria (and prior hurricanes like Hugo, Luis, Hortense and George) shows – the Puerto Rico power grid, as compared to other parts of the country, is peculiarly vulnerable to significant and prolonged outages when severe weather events do (inevitably) occur. This means that communications systems that rely on grid power – such as wireless service, where customers need grid power to charge their phones, or VoIP service (cable-based or otherwise), where customers need grid power for their phones to work and the system needs grid power to function – are inherently unable to meet customer needs during extended power outages. Puerto Ricans understand this, and are therefore, on average, much more reluctant than consumers in the nation as a whole to trade their central-office-based, line-powered landline service from PRTC for either wireless service (cord-cutting) or VoIP service.<sup>35</sup>

Compounding these problems is the high level of poverty and corresponding lower telephone penetration levels in Puerto Rico.<sup>36</sup> A CLEC offering alternative wired telephone services in some markets can attract customers who are willing to try the new service while, at least for a time, leaving their ILEC service in place as a backup. Low-income consumers, however, cannot afford to make that choice, and instead have to pick one provider or the other from the beginning. This creates a barrier to CLEC sales, because the CLEC must entirely overcome the powerful “default” of buying service from the ILEC. Moreover, in more economically fortunate areas, essentially everyone takes some form of telephone service, so a

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<sup>35</sup> Liberty has suggested that a significant portion of funds under the Uniendo Puerto Rico Fund program go towards network “hardening,” including decreasing its own and others’ reliance on grid power for broadband service. *See Liberty Uniendo a Puerto Rico Fund Comments at 6, passim.* Even with a hardened network, however – still many years off – customers without grid power at their premises will not be able to use anything other than line-powered phones, which remains a benefit to PRTC.

<sup>36</sup> *See Liberty Uniendo a Puerto Rico Fund Comments at 28-29.*

competing carrier can reasonably treat the potential market as being the entire population. This means that the costs of facilities used to reach a particular area will be spread over fewer potential customers in Puerto Rico (as compared to the rest of the country). This increases costs, and thereby increases the number of customers that it is economically unviable to serve with the CLEC's own unsubsidized, risk-capital-funded facilities.<sup>37</sup>

In these circumstances, competitive alternatives for voice service in Puerto Rico face much steeper hurdles in competing with the ILEC than competitors face in other parts of the country. The result is that for now and for the foreseeable future, CLECs in Puerto Rico need access to UNEs and discounted resale in order to be able to offer their competitive, innovative services to the public. As suggested above, changing technology and market conditions may make it appropriate to revisit this conclusion at some point in the future, but in the context of USTelecom's current petition for forbearance, this distinctive continuing need by Puerto Rico CLECs for UNEs and discounted resale means that – whatever decision the Commission reaches regarding forbearance from ILEC Section 251(c)(3) and (c)(4) duties elsewhere – the Commission should deny the USTelecom forbearance petition with respect to PRTC, in Puerto Rico.

**E. The History of Competition in Puerto Rico Illustrates the Need for UNEs and Resale.**

The continuing need for CLECs to have access to PRTC UNEs and discounted resale

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<sup>37</sup> The entire point of providing subsidies for the build-out of networks, such as those contemplated by the Uniendo a Puerto Rico fund, is to overcome the fact that, in the absence of subsidies, build-out to all areas is not economically viable. That same logic explains why, in the case of basic local telephone service, there is no prospect that a CLEC could compete across a high-cost ILEC's entire footprint without access to UNEs and discounted resale. Simply stated, where the ILEC has relied on subsidies rather than risk capital to build out its own network, the only rational conclusion is that CLECs will need access to UNEs and discounted resale to be able to effectively compete.

services can be better understood in the context of the long-run evolution of the Puerto Rico marketplace following the introduction of competition with the Telecommunications Act of 1996.

PRTC is the largest telecommunications company in Puerto Rico. Prior to 1996, it was the only company in Puerto Rico that provided local residential and business services. For many years, it was a public corporation, owned and controlled by the government of Puerto Rico. The government sold a controlling share of PRTC to GTE in the late 1990s; it then became a subsidiary of Verizon when that company was formed by the merger of Bell Atlantic and GTE. Then, in 2007, PRTC was acquired by América Móvil.

After enactment of the 1996 Act, many companies tried to enter the Puerto Rico telecommunications market. The first was Lambda Communications in 1995. After several years of litigation with PRTC, Lambda was granted authority to enter the market and was able to interconnect with PRTC. Lambda began providing service in late 1998 as Centennial Puerto Rico License Corp. Dozens of other companies tried to follow, but their fate was not the same. For example, International Telecom (ITL) was also an early competitive local exchange carrier (“CLEC”) to try compete with PRTC in the local fixed-line market. By mid-2001, however, it closed operations in Puerto Rico due to an inability to overcome barriers thrown up by PRTC.<sup>38</sup> Many other companies encountered the same problems and fate as ITL.<sup>39</sup> PRTC systematically drove dozens of companies out of the Puerto Rican market by means of regulatory litigation, outspending them in interconnection negotiations, arbitration and cases in court. Still, and notwithstanding PRTC’s tactics, there are a number of CLECs providing service in Puerto Rico.

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<sup>38</sup> See *Puerto Rico Telecoms, Mobile And Broadband - Statistics And Analyses*, 15<sup>th</sup> Edition, Published 18 December 2017, Paul Budde Communication Pty Ltd., p. 8

<sup>39</sup> *Id.*

That said, as discussed immediately below, the number of **facilities-based** CLECs in Puerto Rico is quite limited, and those that exist have generally limited their footprint to the San Juan metropolitan area, with, in some cases, an additional presence in one or two other major cities around the Island (such as Mayaguez and Ponce). The only truly facilities-based CLEC that covers most of Puerto Rico is Liberty. Liberty's network includes multiple fiber rings with more than 800 miles of fiber, providing interconnection at several locations around Puerto Rico.<sup>40</sup> PRTC has more than a hundred times as much deployed fiber.<sup>41</sup> Moreover, like most cable companies, Liberty's network was not historically built out to serve business-focused areas, particularly outside the San Juan metropolitan region, so it must build to provide services to those areas and/or, in the short run, use PRTC's facilities to reach those customers.<sup>42</sup>

AT&T (formerly Centennial) also operates a digital fiber optic network, but that network is concentrated in San Juan and overall is not significantly larger than Liberty's, when compared to PRTC's extensive facilities deployment.<sup>43</sup> Other partially facilities-based companies, such as WorldNet Telecommunications Inc. and Columbus Network Puerto Rico, Inc., have a limited footprint and are much, much more dependent on PRTC UNEs and resale services.<sup>44</sup>

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<sup>40</sup> See Liberty Uniendo a Puerto Rico Fund Comments at 2.

<sup>41</sup> Puerto Rico Telecoms, Mobile And Broadband - Statistics And Analyses, *supra*, at page 10.

<sup>42</sup> As noted above, Liberty has historically been aggressive in investing in expansion of its network. PRTC, however, has for decades enjoyed the advantage, not only of incumbency, but also of being the recipient of continuing and substantial subsidies for building out and operating its network.

<sup>43</sup> *Id.* AT&T acquired Centennial in 2009.

<sup>44</sup> USTelecom argues throughout its Petition that elimination of ILEC obligations to provide UNEs and discounted resale will help promote investment by CLECs (in alternative facilities) and by ILECs (in broadband facilities). This argument is invalid. As long as the ILEC remains in the landline local service business, the fact that it might also be entering the broadband

PRTC's network scope and coverage, in short, dwarfs that of even its largest competitors. Moreover, even those larger competitors need UNE transport and other UNE services in order to interconnect their facilities around the Island, or to reach customers in areas where their own facilities do not exist. That need became more apparent after the devastation and destruction caused by hurricanes Irma and Maria.

This situation is also affected by the distribution of homes and businesses around the Island. While there are some densely populated areas, mainly around the few metropolitan centers, the majority of the Puerto Rican population is widely distributed. It is particularly difficult to deploy and maintain facilities to reach the population found in the mountainous central region of Puerto Rico.<sup>45</sup> As a result, it is often not efficient or economically feasible for a CLEC to replicate PRTC's network over wide areas where residential and businesses are located together. Consideration of the mountainous central region of Puerto Rico, which covers a larger land mass than the coastal areas, confirms that the idea of fully replicating PRTC's facilities is untenable. Some CLECs, therefore, depend on a mixture of their own network and PRTC's network (with the mix varying among CLECs) to provide their services; but the majority simply depend 100% on PRTC.

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business is irrelevant to the appropriate regulatory obligations to be applied to the local service business – including Sections 251(c)(3) and (c)(4). Moreover, the impact of discounted resale and UNEs on CLEC investments will be determined by the level of the resale discount and the price of the affected UNEs. If USTelecom believes that the cost and pricing standards applicable to wholesale discounts and UNEs are inappropriate, then it should ask the Commission to revise those standards, not to eliminate UNEs and resale altogether. For the reasons discussed above, discounted resale and UNEs remain necessary because the cost of duplicating PRTC facilities is, in many cases throughout PRTC's footprint, simply prohibitive. In this situation, without an obligation on PRTC to provide discounted resale and UNEs at regulated rates, competition will either not exist at all, or will be grossly distorted by virtue of the CLEC being forced to pay unregulated, exploitative prices for those functions.

<sup>45</sup> See Liberty Uniendo a Puerto Rico Fund Comments at 10.

For these reasons, UNEs and discounted resale are essential for competition to exist in Puerto Rico. That is not to deny that there are some business areas, and multi-tenant residential buildings, where CLECs have constructed facilities. These situations, however, are very much the exception, not the rule. Indeed, small to medium sized business (which employ fewer than 50 persons) represent the bulk of private enterprises in Puerto Rico.<sup>46</sup> In 2015, there were 41,867 such businesses, which represented 95% of all private enterprises.<sup>47</sup> Most of these entities are not located in concentrated business areas, but are, instead, scattered all over the Island. Reaching these entities via network construction is often infeasible.

In response to this situation, as indicated above, most facilities-based competitors have deployed their infrastructure mainly in the San Juan metro area, with a limited deployment in a handful of other cities. As a result, there is a great need for UNE transport service in order to interconnect the CLECs' networks with PRTC's network and to reach customers in areas where facilities cannot feasibly be constructed.

Liberty cannot speak to whether there are other areas in the United States that – like Puerto Rico – do not fit within the broad-brush picture of ubiquitous, intense competition that USTelecom is trying to portray. What we can say with certainty is that USTelecom's picture of the United States market is inapplicable to Puerto Rico, and that granting the petition with respect to Puerto Rico would be a harmful for competition and consumers.

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<sup>46</sup> Bureau of Commerce and Exports of Puerto Rico, *Segundo Informe Anual al Honorable Gobernador y a la Asamblea Legislativa del Estado Libre Asociado De Puerto Rico Sobre el Estado de Situación De Las Micro, Pequeñas y Medianas Empresas (PyMEs) en Puerto Rico* (2005) [http://www.comercioyexportacion.com/images/Informe\\_PYMES-2015.pdf](http://www.comercioyexportacion.com/images/Informe_PYMES-2015.pdf).

<sup>47</sup> *Id.*



**F. The Commission Should Not Provide Relief on a Nationwide Basis Without Considering Individual or Regional Markets.**

As indicated by the discussion above, it makes no sense to assess the relief that USTelecom has requested – elimination of core Section 251(c) ILEC requirements – on a broad-brush, nationwide basis. Instead, while we recognize the Commission’s authority, in the abstract, to forbear on a nationwide basis in some cases,<sup>48</sup> in this case, a market-by-market assessment is necessary.

First, as a simple factual matter, USTelecom’s claims are not applicable to all markets throughout the country, and especially not to Puerto Rico. As a result, the Commission should review the Petition on an individual market basis, applying the analysis used in the *Qwest Phoenix Forbearance Order*.<sup>49</sup> USTelecom’s aggregate data simply do not reflect reality on the ground in individual markets. In this regard, in 2016, in response to the *USTelecom Petition for Declaratory Ruling*, the Commission was confronted with similar national data and determined – while acknowledging a market trend – that “these statistics are too broad and general to support detailed competitive findings.”<sup>50</sup> Likewise, the data presented by USTelecom here is too broad and general to be used to make valid competitive determinations. Moreover, in prior petitions that sought similar relief, the Commission determined that it should conduct a per-market analysis to define the relevant product and geographic markets, and to then determine if any

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<sup>48</sup> *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5807-08, para. 439 & n. 1306. (2015) (*Open Internet Order*)

<sup>49</sup> *Qwest Phoenix Forbearance Order*, para. 42.

<sup>50</sup> *Petition of USTelecom for a Declaratory Ruling That Incumbent LECs Are Non-Dominant in the Provision of Switched Access Services*, WC Docket No. 13-3 (filed Dec. 19, 2012) (USTelecom Petition for Declaratory Ruling) at para. 17.

carriers in those markets, individually or jointly, possessed significant market power.<sup>51</sup> Notably, the Commission determined in the *Qwest Phoenix Forbearance Order* that the “market power analysis is the precise inquiry specified in Section 10(a)(1)” for this type of petition.<sup>52</sup>

Here, the Commission must assess whether there is sufficient competition to warrant forbearance in any or all of the markets where the ILECs represented by USTelecom provide

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<sup>51</sup> *Id.*; Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Public Notice, 22 FCC Rcd 13561 (WCB 2007); See, e.g., Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05- 281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959–60, paras. 1–2 (2007) (granting certain conditional forbearance from unbundling obligations in wire centers in the Anchorage study area) (“ACS UNE Forbearance Order”), appeals dismissed, *Covad Commc’n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (granting in part, subject to conditions, certain forbearance from dominant carrier regulation in Anchorage) (“ACS Dominance Forbearance Order”), petitions for recon. pending; Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc., WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) (“Verizon 6 MSA Forbearance Order”) (denying forbearance from dominant carrier, Computer III, and UNE regulations in 6 MSAs), remanded, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) (*Verizon v. FCC*); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07- 9, Memorandum Opinion and Order, 23 FCC Rcd 7257 (2008) (“*Qwest Terry Forbearance Order*”) (granting certain forbearance from dominant carrier and UNE obligations in the Terry, Montana exchange); Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008) (“*Qwest 4 MSA Forbearance Order*”) (denying forbearance from dominant carrier, Computer III, and UNE regulations in 4 MSAs), motion for voluntary remand granted, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) (“*Qwest Corporation v. FCC*”). For a more detailed summary of these decisions, see, for example, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11732–35, para. 4–10.

<sup>52</sup> *Qwest Phoenix Forbearance Order*, para. 37.

service. USTelecom has submitted no evidence that would allow the Commission to make that analysis. To the contrary, its assertions and data are provided in such a general and broad manner that they mask the reality of each individual market.

The implication of this approach is that somehow the entire United States is the relevant geographic market for assessing local competition – clearly an unwarranted conclusion. There are three hundred and eighty-three (383) metropolitan statistical areas (MSAs) for the United States (with seven (7) in Puerto Rico), and many thousands of wire centers. Some are rural, some are urban. Some are subject to severe weather, some are not. Some are already home to existing, flourishing competitors, some are not. The United States is far from being one homogeneous market. Without the participation of – and data regarding – the markets in which each of the ILECs that are members of USTelecom operate, the Commission cannot possibly determine whether any of them faces sufficient competition to protect consumers and the competitive process, in the absence of the regulatory obligations that USTelecom is seeking to eliminate. In the case of Puerto Rico, competition even in urban areas is available precisely because of the requirements PRTC wants to forbear.<sup>53</sup>

The Commission has long recognized that an individual market analysis is needed to understand competitive conditions on the ground.<sup>54</sup> The Commission has previously refused to provide nationwide relief in individual cases where the record did not reflect “sufficient

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<sup>53</sup> In this regard, the Commission and industry participants all recognize that competition is more intense, and more feasible, in urban areas where both business and residential customers are relatively densely packed together. The necessary corollary of this fact, however, is that competition is **less** intense and **less** feasible outside those areas. Even if market conditions might justify forbearance in Rosslyn, Virginia, for example, it would be simply irrational to conclude from that fact that market conditions justify forbearance in Roanoke or Radford. This basic fact of market life in the telecommunications industry necessarily shows that broad-brush, nationwide relief is simply inappropriate in the context of forbearance from Sections 251(c)(3) and (c)(4).

<sup>54</sup> *Qwest Phoenix Decision* at para. 28.

information regarding the nature and competitive conditions associated with particular enterprise” and stated that other carriers could “file their own forbearance petitions showing that granting them relief from dominant carrier regulation for specific [...] services would meet the statutory forbearance criteria.”<sup>55</sup>

Liberty submits that USTelecom seeks uniform relief throughout the nation, rather than individualized relief, because it realizes that, were the Commission to look at the actual situations in actual individual markets, the Commission would conclude that local conditions differ, and that nationwide relief is inappropriate.<sup>56</sup>

**G. Forbearance from Section 251 (c) Rules is not Warranted in Puerto Rico and Should Be Denied for that Market.**

**1. The Legal Standard for Forbearance**

The fact-based discussion above illustrates why USTelecom’s Petition should be denied. The remaining discussion addresses those facts in the context of the specific legal standards governing the Petition.

Assuming that USTelecom has standing and that the Commission will consider the Petition on the merits, then USTelecom must prove that the statutory requirements for forbearance have been satisfied.<sup>57</sup> Section 10 provides that the Commission “shall forbear from applying any regulation or any provision” of the Communications Act to a telecommunications

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<sup>55</sup> *Qwest Phoenix Forbearance Petition* at para. 38. *See also, In the Matter of Petition of AT&T for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 07-180 at para. 41 (rel. Oct. 12, 2007) (declining to extend forbearance relief to ILECs other than Petitioner).

<sup>56</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (Omaha Order)*, 20 F.C.C.R. 19,415 (2005); *ACS UNE Forbearance Order*.

<sup>57</sup> *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1226 (10th Cir. 2012).

service or carrier if three criteria are met: (1) “enforcement of such regulation or provision is not necessary to ensure that” the carrier's practices “are just and reasonable and are not unjustly or unreasonably discriminatory,” 47 U.S.C. § 160(a)(1); (2) “enforcement of such regulation or provision is not necessary for the protection of consumers,” *id.* § 160(a)(2); and (3) “forbearance from applying such provision or regulation is consistent with the public interest,” *id.* § 160(a)(3). Under the third criterion, “the Commission shall consider whether forbearance [...] will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.” *Id.* § 160(b). Thus, Section 10 requires the Commission to forbear when these conditions are met. The D.C. Circuit has stated that the three prongs of Section 10(a) are conjunctive and, thus, the Commission can only grant relief if all three elements of the forbearance criteria are satisfied.<sup>58</sup> Moreover, forbearance authority is limited to certain circumstances. The Commission may only forbear when the provision to be forborne is not needed: (1) to ensure just and reasonable prices and practices; or (2) to protect consumers. Forbearance must also be in the public interest. See 47 U.S.C. § 160(a).

Because forbearance “usurps the exclusively-legislative function of lawmaking” by (in effect) amending the Communications Act adopted by Congress and thus repealing a portion of it,<sup>59</sup> the Commission must consider the consequences of elimination of Section 251(c) in each affected specific market. Congress’ fundamental instrument to open the market to competition are the ILECs obligations to: (1) sell local telephone services to competitors at “wholesale rates” (47 U.S.C. § 251(c)(4)(A)); (2) allowing the competitor to interconnect in the ILEC network (47

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<sup>58</sup> *Cellular Telecommunications & Internet Ass’n v. F.C.C. United States Court of Appeals*, 330 F.3d 502, 509 (D.C. Cir. 2003); *2015 USTelecom Forbearance Petition* at para. 8.

<sup>59</sup> *United States Telecom Association v. Federal Communications Commission*, 855 F.3d 381 (D.C. Cir. 2007)

U.S.C. § 251(c)(2)); and (3) leasing elements of the ILEC networks to a competitor on an “unbundled basis”. Hence, USTelecom is really asking the FCC to do away with the fundamental instruments that allow CLECs to compete.

## **2. USTelecom’s Arguments for Forbearance**

USTelecom argues that forbearance from Sections 251(c)(3) and (c)(4) is warranted because “the marketplace is irrevocably open to competition” due to “robust intermodal competition”<sup>60</sup> In support of this argument, it claims that: (1) Section 251(c) unbundling and resale obligations are “no longer [...] necessary to ensure that rates and practices are just, reasonable and nondiscriminatory, or to protect consumers” since the marketplace is open to competition due to intermodal services; (2) it encourages facilities-based competition, reduces compliance costs and frees capital to be use in deploying broadband networks and advanced services to consumers; (3) will reduce prices over the next decade saving consumers over \$1 billion; and (4) it would increase capital investment by up to \$1.8 billion.<sup>61</sup> By proposing the “elimination” of the unbundling and resale mandates in Section 251(c), USTelecom is aiming to unravel key procompetitive provisions of the Telecommunications Act of 1996 – which, in Puerto Rico, will inevitably serve to preserve and protect PRTC’s dominant market position with respect to basic local telephone and switched access service.

USTelecom argues that the elimination of UNE and resale obligations will remove competitive distortions in the marketplace, claiming that “once competition arises,” unbundling or resale would not bring a “significant enhancement of competition.”<sup>62</sup> Without debating those

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<sup>60</sup> USTelecom Petition, pp. iv, 26

<sup>61</sup> *Id.*

<sup>62</sup> USTelecom Petition, at 25.

claims in general, the fact is that in the case of Puerto Rico, PRTC still dominates the fixed voice service market, and it is unbundling and resale that has kept competition alive. Even if, in the abstract and in some cases, the availability of unbundling and resale could “undermine” CLEC incentives to invest in new facilities, in Puerto Rico those requirements weigh very little in a company’s determination to invest in new facilities. As noted above, the cost of replicating PRTC’s network to win its customers is prohibitive in Puerto Rico, where costs are higher, people are poorer, and business and residential customers are more geographically dispersed than in the country as a whole. This is why the network footprints of the few facilities-based CLECs in Puerto Rico are generally quite limited. In this environment, in order to compete with PRTC across its entire footprint, CLECs must either rely on resale, or collocate in PRTC’s central offices and use UNEs and EELs to provide service to many distant end users. There is no reason to eliminate this form of competition in Puerto Rico.

**3. Enforcement of Unbundling Access and Resale Requirements is Necessary to Ensure that PRTC’s Rates and Practices are Just and Reasonable and are not unjustly or unreasonably discriminatory.**

The relatively low level of competition in the Puerto Rico local telephone market, along with the structural factors that inhibit a more robust growth of competition, render Section 251(c)’s unbundling and resale mandates necessary to ensure reasonable and nondiscriminatory charges and practices in Puerto Rico.<sup>63</sup> Contrary to USTelecom’s assertions, at least in Puerto

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<sup>63</sup> *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc., for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999). In that case, the Commission held that “in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power.” The opposite is also true: where market forces are not robust, they cannot be expected to ensure that the rates, terms and conditions of carrier services are just and reasonable within the meaning of Section 10.

Rico, the marketplace is not fully and irrevocably open. That said, and as noted above, to the extent that competition has developed in Puerto Rico, that development has depended on the continued availability of UNEs and discounted resale from PRTC. One can imagine the Puerto Rico market becoming fully competitive at some point in the future, based on facilities-based rivalry among intermodal competitors, but that day is a long way off. The practical reality in Puerto Rico is that all competitors to some extent – and some competitors to a great extent – still rely on UNEs and resale.

In this regard, in the *UNE Remand Order*, the Commission acknowledged that “the ability of [CLECs] to use unbundled network elements, including various combinations of unbundled network elements” is integral to achieving the goal of competition.<sup>64</sup> At the same time, the Commission recognized that the “purchase of unbundled network elements would, at least in some situations, serve as a transitional arrangement until [CLECs] could develop a customer base and complete the construction of their own networks.”<sup>65</sup> That appears to be what is happening in Puerto Rico, but almost a decade behind the rest of the United States.

The elimination of unbundling and resale in Puerto Rico would significantly reduce competition. Facilities-based CLECs would be unable to effectively extend their ability to compete beyond their footprints, and, as discussed above, it is simply not economically reasonable to try to fully duplicate PRTC’s network. CLECs without facilities would likely simply cease operations.

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<sup>64</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Red 3696,3704, para. 6 (1999) (“UNE Remand Order”)

<sup>65</sup> *Id.*



In that scenario, PRTC would still control large swaths of fixed voice market in Puerto Rico, and would have no independent business reason to offer access to UNEs or discounted resale services. Given the nonexistence of a competitive UNE or resale market, granting the USTelecom Petition for Puerto Rico would leave CLECs unable to provide service on economically viable terms.

In sum, the level of retail and facilities-based competition in Puerto Rico is significantly lower than in the rest of the United States, as depicted in the USTelecom Petition. First, the Puerto Rican market has not developed sufficient facilities-based competitors capable of competing successfully, using their own networks, throughout PRTC's footprint. Second, the wholesale market itself – to the extent that it exists at all outside the regulatory obligations imposed by Sections 251(c)(4) and (c)(4) – is not sufficiently competitive. Third, PRTC still has a majority share of the wired switched access service market in Puerto Rico. Fourth, most of PRTC's competitors have relied and continue to rely, in substantial part, on PRTC's facilities, including the UNEs that would become unavailable under the USTelecom Petition. In conclusion, there is sufficient evidence to conclude that if the Commission were to grant the Petition with respect to Puerto Rico, telephone service consumers in Puerto Rico would not be protected.

#### **4. Enforcement of Unbundling Access and Resale Requirements is Necessary for the Protection of Consumers.**

For the same reasons stated above, continued enforcement in Puerto Rico of Sections 251(c)(3) and (c)(4) (and the associated requirements in Sections 251 and 252) is necessary to ensure just, reasonable, and nondiscriminatory charges and practices – needed to protect consumers. Eliminating these obligations would create havoc in the Puerto Rico telecommunication market. No current Puerto Rico CLEC has the infrastructure to fully replace

PRTC's local loops and interoffice transport system. In the absence of UNEs and resale, therefore, CLECs would be at the mercy of PRTC in trying to reach a private agreement to provide loops and transport and, again, PRTC would have no business reason to reach such an agreement on reasonable terms. Eliminating the mandates of Sections 251(c)(3) and (c)(4) would thus profoundly curtail, or even destroy, competition on the Island, which would inevitably result in degraded service and higher prices for consumers.

#### **5. Forbearance from Section 251(c) Unbundling and Resale Requirements Is Not In the Public Interest.**

The Commission, in assessing the effect of forbearance on the public interest, "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."<sup>66</sup> If the Commission is not able to determine that such forbearance will promote competition among telecommunication providers, the Commission must conclude that the relief USTelecom is seeking is not in the public interest in Puerto Rico.

At present, PRTC remains the dominant provider in Puerto Rico with respect to wired local telephone service. PRTC's market power, if not restrained, allows it to unfairly disadvantage its competitors. In the absence of a regulatory mandate on PRTC to provide UNEs – including both loops and transport – CLECs in Puerto Rico have few, if any, places to turn if PRTC declines to provide the required service or if its prices are too high. Without the current mandates in Section 251(c), PRTC could easily disfavor certain CLECs (if not all) and indeed force some (if not all) out of the market altogether. Obviously, promoting market competition

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<sup>66</sup> 47 U.S.C. § 160(b).

and consumer choice requires avoiding that result. As a result, forbearance would hurt competition in Puerto Rico, and the Commission should thus conclude that the requested relief is not in the public interest.

## **II. CONCLUSION**

The Commission should dismiss the USTelecom Petition because USTelecom lacks standing to obtain the relief it seeks on behalf of its members. Even if the Commission considers the Petition on the merits, however, the Petition should still be dismissed because the competitive determinations required to justify forbearing from future application of Sections 251(c)(3) and 251(c)(4) can only reasonably be conducted on a market-by-market basis, and USTelecom's broad-brush, nationwide data does not permit the required analysis to be conducted.

In any event, the Commission should deny any forbearance relief applicable to Puerto Rico. PRTC, the Puerto Rico ILEC, is not a member of USTelecom, so the Petition cannot reasonably be understood as applying to Puerto Rico in any event. Moreover, and critically, the actual competitive and market situation in Puerto Rico is vastly different than that depicted by USTelecom's general nationwide presentation. Even if, therefore, the Commission were to consider the Petition on the merits, there is no factual basis for concluding that the requirements for forbearance are met in Puerto Rico.

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